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Before the
Federal Communications Commission
Washington, D.C. 20554

Nov 5 4 16 PM '03

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Chillicothe and Ashville, Ohio))
)
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)
)
)MM Docket No. 99-322
RM-9762

DIST 10

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**Adopted: October 29, 2003****Released: October 31, 2003**

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Reconsideration jointly filed by Franklin Communications, Inc., North American Broadcasting Co., and WLCT Radio Incorporated ("Joint Petitioners") directed to the *Report and Order* in this proceeding.¹ Secret Communications II, LLC ("Secret Communications") filed an Opposition to Petition for Reconsideration and the Joint Petitioners filed a Reply. For the reasons discussed below, we deny the Petition for Reconsideration.

Background

2. At the request of Secret Communications II, LLC, former licensee of Station WFCB, Channel 227B, Chillicothe, Ohio, the *Report and Order* reallocated Channel 227B from Chillicothe to Ashville, Ohio, and modified the Station WFCB license to specify operation on Channel 227B at Ashville.² The *Report and Order* was pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.³ *Community of License* requires that any reallocation proposal result in a preferential arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.⁴ In this situation, the reallocation resulted in Ashville (with a population of 3,174 persons) receiving a first local service while Chillicothe (with a population of 21,796 persons) will continue to receive local service from six stations. Because Secret Communications did not propose a change in transmitter site, there was no loss of service to any population. The *Report and Order* did not require Secret Communications to submit a

¹ *Chillicothe and Ashville, Ohio*, 17 FCC Rcd 20418 (Med. Bur. 2002).

² Clear Channel Broadcasting Licenses, Inc. is now the licensee of Station WFCB

³ See *Modification of FM and TV Authorizations to Specify a New Community of License* ("Community of License"), 4 FCC Rcd 4870 (1989), *recon. granted in part* 5 FCC Rcd 7094 (1990).

⁴ 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service.; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

showing pursuant to *Faye and Richard Tuck* to demonstrate that Ashville is independent of the Columbus Urbanized Area and entitled to consideration as a first local service.⁵ This is because Ashville is not located within the Columbus Urbanized Area and Station WFCB provides only 2.7% of the Urbanized Area with a 70 dBu signal.⁶ The *Report and Order* also did not impose a permanent condition prohibiting Station WFCB from relocating its transmitter site.

3. In the Petition for Reconsideration, the Joint Petitioners reiterate the earlier argument that reallocation proposal is a "pitstop" in an effort to relocate Station WFCB to Columbus. For this reason, the Joint Petitioners again request that we impose a permanent condition requiring that Station WFCB operate at its current site. The Joint Petitioners also assert, contrary to the suggestion in the *Report and Order*, that filing an informal objection directed to any subsequent application to relocate the Station WFCB transmitter site closer to Columbus would be an ineffective remedy. In support of this argument, the Joint Petitioners refer to a staff action which dismissed a similar informal objection filed by Technicom, Inc. directed to a minor change application to implement the reallocation of Channel 265A from Pana to Macon, Illinois, and modification of the Station WEGY license to specify operation on Channel 265A at Macon.⁷

4. After careful consideration of this matter, we deny the Petition for Reconsideration. We will not impose a permanent condition prohibiting a relocation of the Station WFCB transmitter site. As discussed in the *Report and Order*, there are valid public interest reasons for a station to relocate its transmitter site. Nevertheless, we remain concerned with the potential for stations to migrate from relatively underserved rural areas proximate to well-served urban areas. For this reason, we will not blindly apply a first local service preference to a proposal for a community proximate to an Urbanized Area.⁸ The *Report and Order* provided Ashville with a first local service. This represents a significant public interest benefit notwithstanding the fact that Ashville is located closer to the Columbus Urbanized Area than is Chillicothe. All stations are required to serve their communities of license. We generally presume in an allocations context that a station will, in fact, do this. However, when a proposed community of license is located within an Urbanized Area or the proposed facility will provide a 70 dBu signal to more than 50% of the Urbanized Area, we require that the rulemaking proponent to submit a showing that the proposed community of license is independent of the Urbanized Area and entitled to consideration as a first local service.

5. In this regard, we concur with the Joint Petitioners that as an Ashville station, it is now possible to relocate the Station WFCB transmitter to a site that would serve most, if not all, of the Columbus Urbanized Area. At such a transmitter site, we would have required a showing pursuant to *Faye and Richard Tuck* to demonstrate that Ashville is independent of the Columbus Urbanized Area and therefore entitled to consideration as a first local service. This potential transmitter site has been noted by the Joint Petitioners and the *Report and Order* was specifically predicated on the reallocation being a

⁵ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

⁶ *Cf. Headland, Alabama, and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995) (required a *Tuck* showing when a 70 dBu signal was provided to more than 50% of the Urbanized Area)

⁷ Letter to John Garziglia, Esq., reference 1800B3-JR (Chief, Audio Division, Media Bureau, Feb. 19, 2002).

⁸ See e.g. *Huntington Broadcasting Co. v. FCC*, 192 F 2d 33 (D.C. Cir. 1951); *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990).

first local service for Ashville. In the event the licensee of Station WFCB subsequently proposes to relocate its transmitter site to a location that would serve more than 50 percent of the Columbus Urbanized Area, the procedure of first proposing only a change in community of license and subsequently proposing the relocation of the transmitter site would effectively circumvent a specific Commission requirement that the licensee submit a showing pursuant to *Faye and Richard Tuck*. In order to avoid any such perception, we issued a *Request for Supplemental Information* requesting Clear Channel Broadcasting License, Inc., licensee of station WFCB, to submit a showing pursuant to *Faye and Richard Tuck* to demonstrate that Ashville is independent of the Columbus Urbanized Area and therefore entitled to consideration as a first local service.⁹ This would enable us to resolve this matter on the basis of a complete record and address any issue with respect to a two-step procedure to implement a migration of a station from a rural to an urbanized area.

6. In response to the *Request for Supplemental Information*, the Joint Petitioners and Clear Channel filed Comments and Clear Channel filed Reply Comments to the Joint Petitioners' Comments. We have carefully considered these Comments and have determined that the reallocation of Channel 227B to Ashville would be entitled to consideration as a first local service regardless of the location of its transmitter site. We will discuss this determination under the guidelines set forth in *Faye and Richard Tuck*.

7. The first area of inquiry concerns the extent a station will provide service to an entire Urbanized Area. As stated earlier, we recognize that Station WFCB could relocate its transmitter site to a location that would serve most, if not all, of the Columbus Urbanized Area. This does not support a conclusion that Ashville is not entitled to consideration as a first local service. As a Class B facility, Station WFCB will serve a large area and any transmitter site closer to Columbus will invariably serve a large portion of the Columbus Urbanized Area. Our second area of inquiry involves the relative populations of Ashville and Columbus. The 2000 Ashville population of 3,174 persons is substantial even though it is less than one percent of the 711,470 person population of Columbus. However, similar population disparities have not precluded favorable consideration as a first local service.¹⁰ Our third, and most important, inquiry is the independence of the suburban community. In *Faye and Richard Tuck*, the Commission set forth eight factors in assessing the independence of a suburban community.¹¹ We will evaluate the Ashville reallocation proposal using each of these factors. As discussed below, a majority of the factors support a determination that Ashville is independent of the Columbus Urbanized Area and entitled to consideration as a first local service.

⁹ *Chillicothe and Ashville, Ohio*, 18 FCC Rcd 11230 (Med. Bur. 2003).

¹⁰ *See Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (M.M. Bur. 1996).

¹¹ The Commission set forth the following eight factors: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own local telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. We have considered a community as independent when a majority of these factors demonstrate that the community is distinct from the urbanized area. *Parker and St. Joe, Florida*, 11 FCC Rcd 1095 (M.M. Bur. 1996); *Jupiter and Hobe Sound, Florida*, 12 FCC Rcd 3570 (M.M. Bur. 1997).

8. The first factor is the work patterns of the Ashville residents. In this regard, the Joint Petitioners refer to the fact that Columbus is a 30-minute commute from Ashville and the data from the 200 U. S. Census indicating that 61 percent of the residents of Pickaway County (in which Ashville is located) work outside the County and have an average commute of 26 minutes. From this, the Joint Parties conclude that the residents do not work in Ashville. In contrast, Clear Channel first notes that while there is no formal data regarding where Ashville residents work, the 2000 U.S. Census indicates that 39 percent of Ashville residents work in Pickaway County, where Ashville is located.¹² Clear Channel has identified numerous businesses in Ashville which suggests that a significant number of persons work and reside in Ashville. This coupled with the fact that 39 percent of Ashville residents work in Pickaway County is sufficient to support a favorable finding on this factor.¹³ In regard to the second factor, whether the smaller community has its own local newspaper or other media providing news and advertising for Ashville, we cannot make a favorable finding. Ashville relies upon the Circleville Herald and the Columbus Dispatch.

9. The third factor, perception of community leaders and residents, and the fourth factor, local government and elected officials, clearly support a determination concerning the independence of Ashville. In addition to listing Ashville civic organizations, Clear Channel has submitted a letter from the Ashville Village Administrator attesting to fact that Ashville was incorporated in 1882 and is a separate and distinct community. Ashville is governed by a mayor and a six-member village council. The local government has its own police, utility, recreation, tax and zoning departments. On the other hand, we are unable to make a favorable finding under the fifth factor. Ashville residents are listed in the Circleville, Ohio, phone book and Ashville shares a zip code with nearby South Bloomfield.

10. The sixth factor, the availability of commercial establishments, health facilities and transportation system supports a finding of independence. Clear Channel has identified numerous local businesses including banks, grocery stores, restaurants and a public golf course. Ashville also has doctors, dentists, veterinarians and a pharmacy. There are also ten churches in Ashville. The residents of Ashville do not rely on the transportation system of any municipality. We are unable to make a favorable finding on the seventh factor concerning the extent Ashville and Columbus are part of the same advertising market. Although Ashville businesses advertise in the Circleville Herald, Ashville is part of the Columbus Arbitron Metro Market, the Columbus Metropolitan Statistical Area and the Nielson Columbus Designated Market Area. Finally, we are making a favorable finding regarding the eighth factor, the extent to which Ashville relies on the larger metropolitan area for municipal services. Ashville does not rely on the Columbus Urbanized Area for any municipal service. Ashville has its own police, water and sewer services, and public library. Ashville is served by the Harrison Township Fire Department and Teays Valley Scholl District.

11. In its Comments, the Joint Parties contend that reallocation of Channel 227B to Ashville and modification of the Station WFCB license to specify Ashville as the community of license is now

¹² Columbus is located in Franklin County.

¹³ See *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia*, 16 FCC Rcd 3411 (M.M. Bur. 2001) (16% of workforce employed in community sufficient to support a favorable finding on this factor).

proscribed by the recently adopted multiple ownership rules.¹⁴ Section 73.3555(a)(1)(ii) of the Commission's Rules permits a single entity to own or control up to seven radio stations in a radio market of 30-44 radio stations.¹⁵ Prior to this proceeding, Clear Channel owned or controlled seven radio stations in the Columbus radio market. In the *Ownership Report and Order*, the Commission revised the definition and means of determining a radio market. Previously, we used a contour-overlap methodology for defining a radio market determining the number of radio stations in that radio market. As a result of the *Ownership Report and Order*, the Arbitron Metro Survey Area, which includes Pickaway County, is now the presumptive Columbus radio market. Based upon the BIA Media Access Pro database, the Columbus radio market includes 43 radio stations. As such, Station WFCB would be the eighth radio station for Clear Channel in the Columbus radio market and would now be in noncompliance with Section 73.3555(a)(1)(ii) of the Rules. For this reason, the Joint Parties contend that the proposal to modify the Station WFCB to specify operation on Channel 227B in Ashville must be denied.

11. We will not deny the reallocation proposal on the basis of noncompliance with Section 73.3555(a)(1)(ii) of the Rules or otherwise set aside the Station WFCB license modification as a result of the *Ownership Report and Order*. There are three reasons for not doing so. First, in order to achieve an efficient and orderly transaction of both the rulemaking and the application process, any issue with respect to compliance with Section 73.3555 of the Rules will, consistent with existing policy, be considered in conjunction with the application to implement the reallocation.¹⁶ Second, the *Ownership Report and Order* did not instruct the staff to revise this policy with respect to allotment proceedings. Third, the United States Court of Appeals for the Third Circuit has stayed the effectiveness of the new media ownership rules set forth in the *Ownership Report and Order*.¹⁷ We will not defer processing or revise existing policy regarding the processing of allotment proposals in order to implement ownership rules not in effect.

12. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by the Joint Petitioners IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

¹⁴ *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 ("Ownership Report and Order")*, 18 FCC Rcd 13620 (2003).

¹⁵ 47 C.F.R. § 73.3555(a)(1)(ii).

¹⁶ *See Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, 17 FCC Rcd 25055 (M.M. Bur. 2002); *see also Letter from Peter H. Doyle, Acting Chief, Audio Services Division, to Paul A. Cuelski, Esq. et al, File No. BAPH-20011101ABD (May 24, 2001).*

¹⁷ *Prometheus Radio Project v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2003) (per curiam) (order granting motion to stay effective date of Commission's new ownership rules).

14. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

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